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April 13, 2015

Jeff S. Jordan

Assistant General Counsel

Office of Complaints Examination
and Legal Administration

Federal Election Commission

999 E Street, NW

Washington, DC 20463

Re: *MUR 6916, Hillary Clinton for President response*

Dear Mr. Jordan:

This response is submitted on behalf of our client, Hillary Clinton for President ("HCFP", the "Committee" or "Respondent"), to the complaint filed in the above-referenced Matter Under Review (MUR 6916). HCFP is the now-terminated principal campaign committee for Secretary Hillary Clinton, as authorized in connection with her 2008 campaign for the office of President. For the reasons explained herein, this complaint is wholly without merit with respect to HCFP. Respondent respectfully requests that the Federal Election Commission ("Commission" or "FEC") find no reason to believe that any violation of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. Section 30101 et seq. (the "Act" or "FECA") occurred and dismiss this Complaint forthwith.

SUMMARY OF FACTS AND RESPONSE

The complaint makes two allegations which presumably and by the most broad reading possible could involve the Committee, however unreasonably. The first -- albeit never stated with respect to HCFP -- is that the Committee somehow received goods and services from one of its data vendors, Catalist, LLC ("Catalist"), at less than the usual and normal charge, resulting in an impermissible in-kind contribution. The second and again never explicitly stated, is that the Committee engaged somehow in impermissible coordination with one or more unidentified or unknown entities that made independent expenditures on its behalf. Both of these allegations are absurd and wholly without merit with the respect to HCFP.

HCFP should be dismissed from this matter for the following procedural reasons: (1) HCFP terminated over two years ago, releasing it from further obligations to defend against specious, politically-motivated complaints such as this, and (2) the five (5) year time period set out in the FEC statute of limitations provision has run with respect to HCFP which conducted its activities in 2007-2008, and no legal action can be brought, regardless of whether any cause of action ever existed.

In addition, with respect to the facts here, the complaint is completely devoid of any information mentioning or referring to HCFP, and is insufficient under 11 C.F.R. Part 111 to be considered a valid

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complaint. The complaint contains no mention of or reference to HCFP, and provides no information as to the Committee's agreement with Catalist, or any other information on which to base its assumption that the Committee was charged less than the usual or normal charge for the Catalist services. The complaint provides no information on any specific independent expenditure or even to identify any group making independent expenditures with respect to the Committee, on which to base its assumption that coordination occurred.

Even if the Commission does not dismiss HCFP from this matter for the compelling procedural reasons listed above, HCFP should still be dismissed for the following substantive reasons. HCFP entered into a written contract with Catalist for data services in 2007. This contract was negotiated between the Committee and Catalist at arms length, and specifically to the point of this matter, the Committee requested express language be inserted into the final contract that indicated (1) no contribution would occur either from Catalist to HCFP, or from another customer of Catalist to HCFP, by virtue of the services provided, and (2) steps had been taken by Catalist specifically to prevent impermissible coordination from occurring. At all times during the pendency of this contract, HCFP clearly believed that (1) it was paying Catalist the usual and normal charge for its services, and (2) its data would not be shared with any other Catalist customer and hence, no coordination would occur by virtue of the agreement. HCFP paid Catalist nearly \$400,000 for the services rendered. Accordingly, there is no basis for any finding of reason to believe that the Committee violated a provision of the Act or Commission regulations.

LEGAL RESPONSE

1. Because HCFP has long since terminated, the Committee must be dismissed from this MUR.

The Committee terminated on January 31, 2013. The Commission accepted the Committee's termination by letter dated February 26, 2013. Termination, by definition, should be sufficient for the dismissal of HCFP from this matter.

While the Commission has advised that termination is not available for a committee "involved" in an FEC enforcement action, see, e.g., FEC Candidate Guide, Chapter 14, page 123, committees that are not otherwise involved in such a matter, are permitted to cease activities and disband, allowing them to be free from ongoing costs of defending matters that arise many years after they conducted their political activities. See also Section 2 below regarding the statute of limitations.

By its plain meaning, termination of a committee comes with the expectation that it no longer exists in any form or for any purpose, including defense of late arising matters. Without such protection, committees would never be effectively able to terminate, but would have to maintain a presence, and consequently, funding, to further defend themselves. Such an outcome is neither expected nor practical under FECA.¹

¹ Moreover, in this case, the Committee was subjected to a Title 2 audit for cause by the Commission, during which the Commission had ample opportunity to raise and examine the very issue which is the subject matter of the complaint. No such concerns were brought to the attention of the Committee during this audit.

Simply put, HCFP terminated over two years ago, releasing it from further obligations to defend against specious, politically-motivated complaints. For these reasons, the complaint in this matter with respect to HCFP is not timely and should be dismissed with respect to the Committee.²

2. Because further action with respect to HCFP is barred by the applicable statute of limitations, the Committee must be dismissed from this MUR.

Even if the Commission determines that the termination of HCFP is not a bar to this matter, the statute of limitations is. FECA contains a statute of limitations provision that bars the Commission from taking any action against a respondent for activities that occur more than five (5) years before. 52 USC §30145 states that "no person shall be prosecuted, tried, or punished for any violation of subchapter I of this chapter, unless the indictment is found or the information is instituted within 5 years after the date of the violation." (52 U.S.C. §30145(a)). In addition, pursuant to 28 U.S.C. § 2462, the Commission's ability to seek civil penalties in federal district court is subject to a five year statute of limitation. *See FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), holding that the five-year general statute of limitations, 28 U.S.C. § 2462, "applies to FEC actions for the assessment or imposition of civil penalties under FECA."

The allegations contained in the complaint with respect to HCFP would have occurred, assuming *arguendo* that they occurred at all, in 2007 or 2008 when HCFP was conducting political activities. Here, to be actionable, the Committee's actions would have had to have occurred in 2009 or later. The Committee was not active during this time period and was in the process of winding down its activities. The Committee had no contract or other agreement with Catalyst post-2008. The Committee conducted no business with Catalyst post-2008.

After the time period set out in the statute has run, no legal action can be brought, regardless of whether any cause of action ever existed. The limitation is an absolute bar to further action with respect to the Committee. Hence, the Commission is effectively barred from instituting any action with respect to HCFP based on the complaint filed in this matter. Accordingly, the complaint with respect to HCFP is not timely and should be dismissed with respect to the Committee.

3. Because the complaint is insufficient under 11 C.F.R. Part 11, HCFP must be dismissed from this MUR.

Even if the Commission determines that neither the termination of HCFP nor the statute of limitations bar this matter, the complaint itself is insufficient for further proceeding under the Act and Commission regulations. Under the Act and Commission regulations, a complaint, to be sufficient, valid and appropriate for filing and consideration by the Commission, must conform to certain provisions set forth at 11 C.F.R. 111.4(d). Included in those minimum provisions are the following requirements:

(3) The complaint should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

(4) The complaint should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.

² The fact that the candidate that authorized the Committee in the first place may seek office in the future is insufficient to give life or obligation to HCFP. Because HCFP was authorized for the 2008 election, and because its termination was accepted by the Commission, any such newly authorized committee will be an entirely separate entity authorized for a different election, and in no way negating the termination of the 2008 committee.

With respect to the facts here, the complaint is completely devoid of any information relevant to HCFP. HCFP is not mentioned or referred to in the complaint. While the complainant makes broad general allegations with respect to (1) the provision of goods and services for less than the usual or normal charge, and (2) the potential coordination of independent expenditures through a common vendor, not one iota of information is provided linking HCFP to either of these allegations. No specific or even general information about the transaction between HCFP and Catalist is provided. No documentation is provided. Simply put, no facts whatsoever are provided on which to base a complaint against HCFP for a violation of FECA. Merely swearing to speculative and unsubstantiated words not supported by facts or personal knowledge should not give rise to Commission consideration of a matter under review.

The complaint makes erroneous assumptions without merit, i.e., that simply by being a customer of Catalist, HCFP presumably received goods or services for less than the usual or normal charge, and that someone, somewhere, coordinated independent expenditures through Catalist. Yet the Committee is effectively deprived of an opportunity to defend itself, because not one piece of information is provided about either (1) the Committee's arrangement with Catalist, or (2) supposed independent expenditures. Clearly, the absence of any supporting or even relevant information demonstrates the political, nuisance and unworthy nature of this complaint. The absence of any mention of HCFP alone demonstrates that this complaint fails to meet the requirements of Part 111 and the Commission should dismiss it forthwith.

4. The allegations contained in the complaint are wholly without merit with respect to HCFP, and for that reason, the Committee must be dismissed from this MUR.

Even if the Commission does not dismiss HCFP from this complaint for the aforementioned reasons, the allegations contained therein are patently false and without merit with respect to HCFP. As stated above, the complaint makes two allegations which presumably and by the most broad reading possible could involve the Committee, however unreasonably. The first -- albeit never stated with respect to HCFP -- is that the Committee somehow received goods and services from Catalist at less than the usual and normal charge, resulting in an impermissible in-kind contribution. The second and again never explicitly stated, is that the Committee engaged somehow in impermissible coordination with one or more unidentified or unknown entities that made independent expenditures on its behalf. Both of these allegations are absurd and wholly without merit with respect to HCFP.³

a. The Committee took the necessary steps to ensure that it paid the usual and normal charges for the services it was provided.

HCFP entered into an agreement with Catalist in 2007 for the provision of data services. See Exhibit A. The agreement was in the form of Catalist's standard written contract, negotiated at arms length between the entities. Notably, as was its standard practice in similar agreements, HCFP requested specific language be added to the contract to assure the Committee that both the arrangement itself, and specifically, the amounts due to Catalist in accordance with the agreement, were structured to prevent a contribution from being made by Catalist to the Committee (or from any other customer of Catalist to the Committee). See Section 7.1 Representations and Warranties:

7.1 By Catalist. Catalist hereby represents and warrants (a) that it is duly organized and validly existing in its state of incorporation; (b) that the Services shall be performed in a

³ As stated earlier, the Commission presumably examined the Committee's contracts when it conducted the thorough and detailed audit of the Committee pursuant to its Title 2 audit authority. The Commission's auditors did not identify either of these issues as a matter of concern at that time.

professional and workmanlike manner, consistent with industry standards in the data processing industry; and (c) that its performance of the Services, and the terms and conditions contained herein, shall not knowingly be in violation of any applicable laws, rules, or regulations, in that these terms and provisions would be available to and required of non-campaign clients of Catalist and are no more or less favorable than offered to non-campaign clients, if any. Catalist intends to fully comply with all applicable Federal Election Commission regulations and has examined and structured this arrangement so as to prevent a contribution from resulting from *either (a) Catalist to Customer or (b) another customer of Catalist's to Customer.* (emphasis added)⁴

In addition, the same section of the written contract states that Catalist would charge non-political customers the same amounts, and that HCFP was not being charged a favorable amount. Thus, the written contract could not be more explicit in express terms that the Committee did not desire and was not going to accept an in-kind contribution in connection with these services. At all times, the Committee was of the sincere and unmistakable belief that (1) it was being charged and was, in fact, paying the amount usually and normally required of all customers of Catalist's, including non-political customers, and (2) Catalist had priced its services in a way to explicitly prevent a contribution from occurring.

HCFP paid Catalist substantial fees for the services it received, totaling \$370,525. In light of this amount, and in light of the warranty language that the Committee insisted be contained in the contract, HCFP had no reason whatsoever to believe that the amounts it paid were less than the usual or normal charges. Simply put, HCFP had no reason to believe and, in fact, did not believe that a contribution occurred. For this reason, the complaint's allegation regarding improper in-kind contributions has no merit with respect to HCFP, and the Committee should be dismissed from this matter.

b. The Committee took the necessary steps to ensure that its activities were not coordinated by virtue of the Catalist contract.

Even more absurd is the idea that HCFP engaged in impermissible coordination in 2007 and 2008. Again, the Committee insisted that additional language be added to the written contract to ensure that impermissible coordination not occur. See Section 5.1(d):

5.1 (d) No Coordination. Catalist shall not relay any material information about Customer's plans, projects, activities or needs for any purpose that would result in coordination under 11 CFR 109.21. *Catalist hereby represents and warrants that it has instituted reasonable measures to prevent impermissible coordination under 11 C.F.R. 109.21.* (emphasis added)⁵

As above, the written contract could not be more explicit in express terms that the Committee did not desire and was not going to participate in impermissible coordination in connection with these services. At all times, the Committee was of the sincere and unmistakable belief that Catalist had structured its services in a way to explicitly prevent coordination from occurring.⁶

⁴ Italics indicates language requested by HCFP.

⁵ Italics indicates language requested by HCFP.

⁶ To further bolster its protections, the Committee also inserted the language in Section 6 of the contract, whereby Catalist is prohibited from selling, trading, transferring, loaning, or using HCFP's data for any unauthorized purpose, including allowing another customer of Catalist's to use it.

In addition, HCFP was a primary election committee and was engaged in a well-known hard fought intra-party primary contest. Based on information and belief, HCFP is unaware of any entities making independent expenditures in the 2008 primary election when most interested and potentially supportive groups watched the primary contest unfold and waited for the party to have a nominee that such groups could support in the general election. As a matter of timing and practicality, most independent expenditure activities are conducted in connection with general election activities, and complainant fails to identify even one independent expenditure or name an entity making independent expenditures in the 2008 presidential primary contest. Consequently, HCFP is being asked to disprove the unknown, based on the most overly broad, unsubstantiated claims. Simply put, HCFP had no reason to believe and, in fact, did not believe that impermissible coordination occurred. For this reason, the complaint's allegations regarding improper coordination has no merit with respect to HCFP, and the Committee should be dismissed from this matter.

Thus, for the foregoing reasons, this Complaint is wholly without merit. Respondents respectfully request that the Office of General Counsel recommend to the Commission that they find no reason to believe that any violation of the Act or Commission regulations has occurred and dismiss this Complaint forthwith.

Respectfully submitted,

Eric Kleinfeld

Eric Kleinfeld
Lyn Utrecht
Counsel to Hillary Clinton for President

Attachment: Exhibit A